

This new chart shows, as did the earlier ones,<sup>43</sup> that the burden of carrying local broadcast stations has diminished over time as cable capacity has expanded.<sup>44</sup> And it also shows that the relative burden of carrying both DTV *and* NTSC signals will be *less* than the initial burden of carrying only analog signals (13.42 percent for analog commercial stations in 1993 and 8.43 percent for both DTV and NTSC at yearend 2003).

Thus, this chart, constructed with cable's own data, stands in response to the cable commenters which complain of the burden of DTV must carry and the harm to cable programmers.<sup>45</sup> Cable responses to the survey also show that, uniformly, cable industry respondents indicated their expectations that digital broadcast signals will be carried in pairs on 6 MHz channels using 256-QAM modulation. Thus DTV signals will utilize but 3 MHz each when carried by cable. MWG Report at 12. The MWG Report in fact shows that *within the statutory one-third cap* there will be by the end of 2003 cable bandwidth available to the *average* subscriber to carry both the analog and digital signals of 25 stations (which is the greatest number of stations in any market). *Id.* And 86 percent of subscribers will have 25 MHz more available to them than will be delivered to the average subscriber,<sup>46</sup> which would accommodate another eight DTV signals, or almost 3 paired NTSC/DTV signals.

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<sup>43</sup> NAB constructed a similar chart, using available projections for cable upgrades. Reply Comments of NAB, CS Docket No. 98-120, Dec. 22, 1998 at Exhibit G.

<sup>44</sup> See *Turner II*, 520 U.S. at 215.

<sup>45</sup> See Comments of NCTA at 15; Joint Comments of The Filipino Channel *et al.* at 25; Comments of TWC at 22, Comments of C-SPAN at 2.

<sup>46</sup> Thus, A&E is wrong to assert that "the broadcast industry has all but conceded the fact that there will be insufficient channel capacity to accommodate all needs under a must

This chart shows as well that, when the transition is complete and the analog signals are turned off, the burden of carriage for all commercial DTV stations diminishes to **three percent** of capacity. *Id.* at Chart 7. The actual burden of course will be much lower, considering that many of these single signal DTV stations will be carried pursuant to retransmission consent agreements rather than must carry, and thus cannot be considered a “burden” at all. *See* Turner II, 520 U.S. at 215.

## **II. Preserving Free TV Remains A Substantial Government Interest, Despite Cable’s Claims of Unfairness**

Cable parties repeat<sup>47</sup> a basic theme seen in their 1998 comments: that DTV must carry would amount to a “unfair” and “unnecessary” preference for broadcasters and broadcast programming over cable.<sup>48</sup>

### **A. Cable Attempts to Re-Argue the “Fairness” of Must Carry**

Cable parties continue to rail against the “fundamental unfairness” of must carry *See, e.g.,* Comments of C-SPAN at 2 and assert that it is inherently unfair because it favors one class of programmers over another. *See, e.g.,* Comments of A&E at 2. As AT&T puts it, “the question is not whether cable operators have the capacity to carry dual

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carry regime, and that some programmers must be sacrificed” (Comments of A&E at 17) by requesting that the FCC include in its must carry rules that one signal of each local broadcaster be carried first. As the MWG Report statistics suggest, a situation where not all local broadcasters could be accommodated within the one-third cap is *highly* unlikely to occur.

<sup>47</sup> Comments of AT&T at 3; Comments of A&E at 2, 14,15; Comments of C-SPAN at 2; Comments of Insight/Mediacom at 3.

<sup>48</sup> *See e.g.,* A&E Comments (filed Oct. 13, 1998) at 42-43; MediaOne Comments (filed Oct. 13, 1998) at 21; C-SPAN Comments (filed Oct. 13, 1998) at 14-15 and Exhibit A; MediaOne Comments (filed Oct. 13, 1998) at 21; C-SPAN Comments (filed Oct. 13, 1998) at 4-6; TCI Comments (filed Oct. 13, 1998) at 21; Time Warner Comments (filed Oct. 13, 1998) at 9,10.

broadcast signals, but why, out of all the competing uses, broadcasters should receive a government guaranteed right to that capacity.” Comments of AT&T at 3, 11.

But what cable complaints amount to is a re-arguing of the fairness of the basic concept of must carry. Cable operators and programmers alike seemingly refuse to accept that there *is* a preferred berth on cable systems for local broadcast signals, but not for cable programmers.<sup>49</sup> To a commenter, they ignore the underlying basis for must carry: that Congress found and the Supreme Court agreed that cable is a monopoly gatekeeper that has the means, the incentive and the history of disadvantaging local broadcast competitors. And they ignore Congress’ finding that, without must carry, broadcasters would not be able to fairly compete.<sup>50</sup> Thus, without must carry, broadcasters are far from being on an equal footing with cable programmers. This fact all cable parties choose to ignore.

Nonetheless, cable claims that DTV must carry would be unjustified because the digital broadcast programming would be largely duplicative of analog programming that consumers already receive. Comments of AT&T at 9; Comments of C-SPAN at 3. But

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<sup>49</sup> A&E demonstrates that it either does not understand or that it does not accept the rationale and underpinnings of broadcasters’ right to cable carriage by stating (at 2) that it “has never asked the government to guarantee our niche.” A&E’s comments read as though *Turner II* had been decided the other way.

<sup>50</sup> Starz Encore Group asserts (at 5) that “[t]here is no basis in law or policy to exempt broadcasters from this competitive marketplace.” Starz also misses the point of having DTV broadcasts available to consumers so that they would have a reason to purchase a DTV set when it states (at 5) that “such an artificial competitive boost for DTV signals is all the more inappropriate in view of the fact that *virtually no one can see the DTV signals because virtually no one has a television set which can receive them.*”

here again cable misses the point, made by broadcasters<sup>51</sup> and the Consumer Electronics Association at 6, that, without access to the audience, there is little incentive to produce or procure original digital programming. As CEA notes, “knowing that that cable systems will carry digital broadcast signals, more digital content will be developed by programmers . . . [and] broadcasters . . . .”<sup>52</sup>

#### **B. Thirty Percent of U.S. TV Sets Are Broadcast-Only**

AT&T, at 10, further questions the justification for DTV must carry “in light of the diminishing importance of the broadcast industry in the video marketplace.” In response, NAB/MSTV/ALTV point out that broadcast television continues to play a vital role in the delivery of video programming to millions of consumers, particularly those with lower incomes.<sup>53</sup> According to data in the Spring 2001 Home Technology Monitor

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<sup>51</sup> Maranatha Broadcasting Company, Inc. at 7 (“MBC cannot be expected to incur the time and expense of developing other digital programming options without knowing that FCC rules will guarantee cable subscribers access to that programming.”); Comments of KSLS, Inc. and KHLS, Inc. at 3 (Without must carry, “there will be a limited number of potential viewers for KSCI-DT and KIKU-DT and their ambitious DTV programming plans would be unsustainable. Without digital must carry provisions KSCI’s and KIKU’s digital stations will instead be forced to simulcast the program schedules of their associated analog facilities for the entire duration of the transition period, depriving Asian Americans and Middle Eastern immigrants in Southern California the opportunity to view the ethnically oriented programming that would only be offered on KSCI-DT. The same result would occur in Hawaii where the Asian population is even greater.”)

<sup>52</sup> Comments of CEA at 7.

<sup>53</sup> Data from the Home Technology Report shows that households relying solely on over-the-air broadcasting are predominantly lower income. While nationwide approximately 21% of television households are broadcast-only, approximately 33% of television households with incomes under \$30,000 annually are broadcast-only. In contrast, just over 10% of the households with annual incomes exceeding \$75,000 depend solely on over-the-air broadcasts to receive video programming. In addition, broadcast-only households include relatively greater numbers of racial/ethnic minorities. For example, while about 18% of white television households nationwide are broadcast-only, approximately 24% of African-American and 32% of Hispanic television households rely

Ownership Report prepared by Statistical Research, Inc. ("Home Technology Report"), there are approximately 46.5 million television sets in broadcast-only homes.<sup>54</sup> An additional 34.5 million television sets in households subscribing to a multichannel video programming distributor ("MVPD") service remain unconnected to the MVPD service. Thus, a total of 81 million television sets (or approximately 30.3% of the 267 million sets in the U.S.) are not connected to any MVPD service and receive their only signals over-the-air.

The Home Technology Report also estimates that 20.9% of all television households nationwide are broadcast-only homes, and over 41% of all households contain at least one broadcast-only set. This recent study clearly demonstrates that millions of consumers rely, solely or in part, upon free, over-the-air broadcast television reception for their delivery of video programming.<sup>55</sup>

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completely on over-the-air broadcasting. Thus, it is clear that the broadcast-only households in the U.S. include a disproportionate number of viewers who would be least able to afford a subscription television service (or, indeed, any other information technology service, such as Internet access).

<sup>54</sup> This Report, issued twice a year by Statistical Research, Inc., is a comprehensive survey of television, telephone and computer equipment in U.S. homes. This estimate of the number of broadcast-only television sets is derived from information in the Home Technology Report and from Nielsen's estimates of the number of U.S. television households.

<sup>55</sup> NAB/MSTV/ALTV also emphasizes that, even for television households subscribing to an MVPD service, broadcast stations remain a very significant source of local, diverse programming. The broadcast stations carried on cable systems continue to provide a guaranteed minimum of local and diverse voices for subscribers. As the Commission has explicitly recognized, most programming carried on any cable system is "either originated or selected by the cable system operator, who thereby ultimately controls the content of such programming." *Report and Order* in MM Docket Nos. 91-221 and 87-8, 14 FCC Rcd 12903, 12953 (1999). Moreover, according to the Commission, cable systems "typically do not serve as *independent* sources of local information; most of any

### C. Cable is Wrong That Digital Must Carry Is Unnecessary

Cable also claims that must carry is unnecessary because “cable operators have shown that they are willing to negotiate for carriage of digital broadcast programming” Comments of AT&T at 8, that “market forces will ensure carriage of digital signals that consumers find desirable” Comments of TWC at 14, that analog carried under retransmission consent agreements stations have the “leverage” to negotiate for digital carriage Comments of NCTA at 12 and that more digital carriage deals have not been signed because there is “not much digital programming” but that carriage issues will be resolved as broadcasters roll out digital programming Comments of AT&T at 8-9.

These statements seem disingenuous at best. One, cable’s own responses to the FCC survey show paltry carriage today and minimal carriage agreements for the future. Responses to the FCC survey show, at most, 27 digital stations carried now by only one cable system each (out of 202 stations on-air),<sup>56</sup> with nineteen of those by TWC alone.<sup>57</sup> And TWC’s responses list agreements for future carriage with just two network affiliate

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local programming they provide is originated” by broadcast stations, which “are the dominant source of *local* news and information.” *Memorandum Opinion and Second Order on Reconsideration* in MM Docket Nos. 91-221 and 87-8, at ¶ 22 (2001) (emphasis in original).

<sup>56</sup> Cox Communications Survey Response (filed May 30, 2001); Charter Communications Survey Response (filed June 1, 2001); Cable One Inc. Survey Response (filed June 13, 2001); Insight Communications Survey Response (filed June 13, 2001); Cablevision Systems Corp. Survey Response (filed June 13, 2001); BellSouth Interactive Media Services Survey Response (filed June 13, 2001); Adelphia Communications Corp Survey Response (filed June 13, 2001); AT&T Broadband Survey response (filed June 13, 2001); Comcast Corp. Survey Response (filed June 13, 2001); Time Warner Cable Survey Response (filed June 19, 2001); RCN Survey Response (filed June 28, 2001); Armstrong Cable Services Survey Response (filed June 28, 2001).

<sup>57</sup> Time Warner Survey Response at 6.

owners, Hearst-Argyle and Belo.<sup>58</sup> Two, AT&T has agreements only with NBC and Fox for carriage of their owned and operated stations (“O&Os”), and no agreements with CBS, ABC and PBS which carry nightly schedules of HDTV. Three, the survey conducted by NAB and reported in initial comments belie cable’s willingness to negotiate for carriage.<sup>59</sup> Four, retransmission agreements with network O&Os for future carriage by some MSOs represent roughly 80 stations (out of some 1200 local commercial broadcasters).

Cable, setting up something of a Catch-22, also alleges that stations insufficiently popular to secure voluntary carriage (the must carry stations) will do nothing to sell digital sets and thus their carriage is unimportant to the transition. Comments of TWC at 14; Comments of NCTA at 12. One, it is the stations that cannot reach voluntary carriage agreements that are in the most need of must carry’s access to the audience to build their DTV futures. Two, as noted above, KSLS, Inc. explains how its ambitious foreign language plans for its digital stations (and for 20% of the population in its market of immigrant/foreign language backgrounds) cannot be justified without access to its entire audience (cable controls access to 88% and 63% of its markets). It says it could not secure retransmission of its analog stations and depends on must carry for its survival. Comments of KSLS at 1-3. Similarly, Marantha Broadcasting tells how it cannot follow through with providing Spanish-language and other digital options without assurance of

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<sup>58</sup> See Comments of NAB/MSTV/ALTV, CS Docket Nos. 98-120, 00-96, 00-2, June 11 2001 at Appendix C (an statement submitted by the general manager of the Belo station in Dallas which has been on air in digital since November 1998 and has transmitted compelling network and local programming since then and has been unable to gain carriage on any cable systems in its market).

<sup>59</sup> See Comments of NAB/MSTV/ALTV at 21- 25 and Appendix B.

audience access. Comments of Marantha at 7.<sup>60</sup> In the same vein, both Entravision and Univision Spanish-language broadcasters assert the need for digital must carry to reach their audiences.<sup>61</sup> NAB/MSTV/ALTV suggest that access to Spanish-language digital broadcasts *is precisely what is needed* for Spanish-speaking viewers to be enticed to buy DTV sets. As Univision says, “carriage via retransmission consent is not a realistic option for Univision, or any other independent, foreign-language, or non-commercial television station that lacks the mass market audiences and economic bargaining chips of ABC, NBC, CBS and Fox.” Comments of Univision at 17. And, as Univision points out, it is currently available to 93% of all Hispanic households, and is the fifth largest full-time network, delivering larger prime time audiences than all broadcast and cable networks except ABC, CBS, NBC and Fox. *Id.* at 2.

Univision further states, “[w]ithout must-carry requirements, no cable system will voluntarily reach retransmission agreements with every DTV broadcaster in the market, and the statutory standard [for ending the transition] will never be met. Comments of Univision at 15. That is, as Univision explains, the Balanced Budget Act mandate for the transition to end in 2006 requires 85 percent DTV set penetration and “a cable system must carry at least one channel of programming from each and every DTV broadcaster in the market in order for the cable-viewing households to be counted as part of the DTV viewing audience for calculation of the 85% benchmark.” *Id.* Thus Congress’ standard for ending the transition requires 85 percent of households to have DTV sets or

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<sup>60</sup> See also Comments of STC Broadcasting at 8 that, without digital must carry, there will be no incentive for broadcasters to offer different programming on their digital channels.

<sup>61</sup> Comments of Univision Communications (filed June 11, 2001) at 3; Comments of Entravision Holdings (filed June 11, 2001) at 6.



converters *and*, for cable households, access to all local DTV signals via cable.<sup>62</sup>

Cable, relying on the same arguments it made against must carry in 1992, resists the notion that must carry is necessary to end the transition as surely as it resists acknowledging that a reason for the DTV transition is to preserve over-the-air broadcasting, all to the end sought by Congress in enacting cable must carry.

### **III. Cable Avoids the Core Point That a Primary Purpose of the DTV Transition Is To Preserve Free Over-the-Air Broadcasting.**

While primarily repeating prior arguments, cable parties go to great lengths to dispute that digital must carry would serve the substantial government interests identified in *Turner I* and *II*<sup>63</sup> as sufficient to support imposition of must carry obligations on cable systems, or even that digital must carry would speed the DTV transition.<sup>64</sup> In doing so, however, they ignore the core point that a primary *purpose* of the DTV transition is to preserve free over-the-air broadcasting in the digital age. No doubt the cable commenters avoid this basic point because it ties together digital must carry, achieving a successful DTV transition and the Congressional/*Turner* goals of preserving free broadcasting, promoting the widespread dissemination of information from a multiplicity of sources and promoting fair competition.<sup>65</sup>

While cable never mentions preserving free, over-the-air broadcasting as a purpose

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<sup>62</sup> The Congressional Budget Office reached the same conclusion. See “Completing the Transition to Digital Television,” Congressional Budget Office, September 1999 (“CBO Report”), Chapter II at 6.

<sup>63</sup> *Turner Broadcasting System v. FCC*, 512 U.S. 622 (1994) (“*Turner I*”); *Turner Broadcasting System v. FCC*, 520 U.S. 180 (1997) (“*Turner II*”).

<sup>64</sup> Comments of NCTA; Comments of AT&T; Comments of TWC; Comments of Insight.

<sup>65</sup> *Turner II*.

of the DTV transition, the Commission certainly has.<sup>66</sup> As the Commission said in the *Reports and Orders* launching the new DTV service, “[w]e reaffirm in this proceeding our intention to preserve and promote universal, free, over-the-air television”<sup>67</sup> and “[o]nly if DTV achieves broad acceptance can we be assured of the preservation of

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<sup>66</sup> "Broadcasters have long recognized that they must make the switch to digital technology. The viability of digital broadcast television will require millions of Americans to purchase digital television equipment. Because of the advantages to the American public of digital technology -- both in terms of services and in terms of efficient spectrum management -- our rules must strengthen, not hamper, the possibilities for broadcast DTV's success. ...Only if DTV achieves broad acceptance can we be assured of the preservation of broadcast television's unique benefit: free, widely accessible programming that serves the public interest. ...Digital broadcasters must be permitted the freedom to succeed in a competitive market, and by doing so, attract consumers to digital. In addition, broadcasters' ability to adapt their services to meet consumer demand will be critical to a successful initiation of DTV." *Fifth Report and Order*, MM Docket No.87-268, 12 FCC Rcd 12809, 12811-12 (1997). "First, we conclude that the DTV Standard will serve our goal of ensuring that all affected parties have sufficient confidence and certainty in order to promote the smooth introduction of a free and universally available digital broadcast television service. As we have recognized before, broadcast television is unique. It is free, available to nearly every American, and many Americans rely on broadcast television programming as a primary source of information and entertainment. Because of these characteristics, we stated that the goals of certainty and reliability take on special significance and strengthen the case for our adoption of a DTV standard. The DTV Standard we adopt today will help ensure that broadcast television remains available to all Americans in the digital era." *Fourth Report & Order*, MM Docket No. 87-268, 11 FCC Rcd 17771, 17787-88 (1996).

"[W]e will pursue and balance the following goals in this proceeding: 1) preserving a free, universal broadcasting service; *Fourth Further Notice of Proposed Rule Making/Third Notice of Inquiry*, MM Docket No. 87-268, 10 FCC Rcd 10540, 10541 (1995). "As we have previously stated, our objective in this proceeding is to effect a major technological improvement in television transmission by allowing broadcasters to implement ATV. (*Second Inquiry* at 6537) Our goal is 'not to launch a new and separate video service.' (*Second Inquiry* at 6537) Thus, in order 'to preserve and improve existing broadcast service and the benefits that this service delivers to the public,' we have generally proposed restricting initial eligibility for ATV frequencies to existing broadcasters." (*Second Inquiry* at 6537-38) *Further Notice of Proposed Rule Making*, MM Docket No. 87-268, 6 FCC Rcd 7024, 7025 (1991).

<sup>67</sup> *Fourth Further Notice of Proposed Rule Making/Third Notice of Inquiry*, MM Docket No. 87-268, 10 FCC Rcd 10540, 10543 (1995).

broadcast television's unique benefit: free, widely accessible programming that serves the public interest."<sup>68</sup> So, too, does the FCC tie together broadcasters' DTV transition with the *Turner*-endorsed Congressional goal of promoting fair competition in the market for television programming.<sup>69</sup> Free over-the-air broadcasting must transition to digital technology to remain competitive in the new digital age.

Other commenters also connect the broadcasters' digital transition with preserving local broadcast service and with the other goals of must carry as identified in *Turner I* and *II*.<sup>70</sup> As Spanish-language broadcaster Univision and smaller/medium market broadcaster STC Broadcasting make clear, digital must carry promotes the very governmental interests approved in the *Turner* cases, as well as the additional (but connected) interest of a swift, successful DTV transition and reclamation of spectrum for other worthy public uses.<sup>71</sup>

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<sup>68</sup> *Fifth Report and Order*, MM Docket No.87-268, 12 FCC Rcd 12809, 12811-12 (1997).

<sup>69</sup> "By permitting the broadcast industry to make the transition to ATV, we ensure that all competitors in the local video services market can compete on this new technological level and, hence, that the public continues to enjoy the benefits that flow from such competition." *Second Order/Further Notice of Proposed Rule Making*, MM Docket No. 87-268, 7 FCC Rcd 3340, 3342 (1992). "Digital broadcasters must be permitted the freedom to succeed in a competitive market, and by doing so, attract consumers to digital." *Fifth Report and Order*, MM Docket No.87-268, 12 FCC Rcd 12809 (1997).

<sup>70</sup> See Comments of Univision at 16 ("The intent of transitioning broadcast service to DTV was to augment broadcasters' ability to provide these local services [local news, weather, and entertainment] to the public, and the Commission should not allow the DTV transition to have the opposition effect.") See also Comments of Public Broadcasters at 5 ("The transmission of digital signals and the ability of all consumers to receive them are necessary . . . to ensure that there will be a broadcast television service in the years to come.")

<sup>71</sup> Comments of Univision at 19; Comments of STC Broadcasting at 6-9.

The Consumer Electronic Association likewise points to the FCC's recognition of the critical nature of the digital transition to broadcasting's preservation and to the fact that "allowing cable operators to exercise their bottleneck control to deny consumer access to digital broadcasting during its infancy will undeniably thwart the public acceptance of DTV." Comments of CEA at 3.

Cable parties, however, assert that digital must carry will not serve the interest of preserving free, over-the-air broadcasting because broadcasters will retain their analog carriage on cable systems and those revenues will suffice to maintain the broadcasting system.<sup>72</sup> Broadcasters vehemently disagree, finding great and even ultimate harm from the lack of additional DTV revenues (without DTV access to the entire audience) and a long drawn out DTV transition (inevitable without digital carriage),<sup>73</sup> accompanied as it would be by dual operating costs over a twenty year plus period (particularly dual electric bills), all on top of enormous DTV build-out costs.<sup>74</sup> This scenario would be particularly threatening for stations in smaller markets, many of which operate on the thinnest (if that) margins and cannot see survival under such circumstances.<sup>75</sup> STC makes the point that, without digital must carry, smaller market stations will have no possibility of recovering the substantial investment in digital facilities, an expense, it says, that can outstrip a

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<sup>72</sup> Comments of NCTA at 8; Comments of A&E at 9; Comments of AT&T at 18; Comments of TWC at 11.

<sup>73</sup> See NAB/MSTV/ALTV Comments, CS Docket Nos. 98-120, 00-96, 00-2, June 11, 2001 at 7-19, 40 of Appendix A.

<sup>74</sup> Comments of Univision at 13, 14, 16; Comments of STC Broadcasting at 3-7;

<sup>75</sup> Comments of STC at 16; See Comments of Public Broadcasters at 5, 21; Comments of KSLS at 3.

station's annual revenues. Comments of STC at 1-6. It says that these harsh cost and revenue realities can even result in the loss of local television ownership diversity and reduced competition. Comments of STC at 6.

As the Kraemer/Levine Report attached to NAB/MSTV/ALTV's initial comments at Appendix A makes clear, a prolonged DTV transition (which no digital must carry will inevitably cause) would leave broadcasters anchored simultaneously in both the analog and digital worlds, hemorrhaging capital with no near-term return on their digital investment. Kraemer/Levine Report at 23. Small market stations, particularly those in the lowest percentile of their markets in terms of profitability, will find it impossible to support dual operations in a long drawn-out transition.

To present the financial picture of these smaller stations, NAB/MSTV/ALTV prepared charts representing station profitability both in markets 75 and above and in markets 100 and above, which are attached as Appendix D. The data for these charts is from the 2000 NAB/BCFM Television Financial Survey, and references financial data from year 1999. As is readily apparent, even before shouldering the brunt of DTV capital costs and without the drain of expensive dual operations over many years, many of these stations were not making a profit in 1999, a "good" year. Dual operations over a particularly prolonged period will be a burden for smaller market stations, and devastating for those in already strained financial condition. Electricity costs alone will be many thousands of dollars a month for each operation.<sup>76</sup> At some point, analog equipment will require substantial repair or replacement. While these costs may be managed for a time without cutting too far into other necessary operational expenditures,

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<sup>76</sup> See Statement of James Babb attached hereto in Appendix E.

prolonged dual operations will become problematic for many, and a serious threat for the marginal operations.

NAB/MSTV/ALTV asked two broadcasters with experience operating smaller market stations to review these financial charts and comment on the impact dual digital and analog operations for twenty plus years would have on local service. Their statements are contained in Appendix E. They both conclude that prolonged dual operations for small market stations, with no DTV must carry, will drain scarce resources, mandate reductions in service to the public and, for many, be fatal to continued operation. In fact, they predict doom for the future of small market television in general without digital must carry to speed the transition along.

The trade press reported that a top FCC policy official recently underscored that free, over-the-air broadcasting must convert to digital or “consumers will go elsewhere” and that the digital transition must be quick for the sake of the industry’s survival.<sup>77</sup> Dr. Robert Pepper, Chief of the FCC’s Office of Plans and Policy, was quoted as saying to an industry conference on digital television “What’s the rush for broadcasters? The rush is the survival of your business.” *Id.*

And as Univision noted in its comments, the Congressional Budget Office (with a self-described mandate to provide objective, impartial analysis to Congress) has concluded that “[w]ithout digital must-carry rules for cable systems during the transition, . . . the likelihood of reaching the 85 percent penetration rate that marks the transition’s end in a market appears small”<sup>78</sup> and “a strong must-carry requirement for cable systems

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<sup>77</sup> Communications Daily, Vol. 21, No. 143, Wednesday, July 25, 2001.

<sup>78</sup> Comments of Univision at 6-7. See, CBO Report at Chapter II at 7.

to carry DTV signals—a digital version of the analog rules—will be necessary to achieve the mandated market penetration level by 2006 and end the transition.”<sup>79</sup> The CBO Report found that a “fundamental element of the timely introduction of digital TV is the availability of digital programming on cable systems. Indeed, cable carriage of such broadcasters is perhaps the most important factor affecting how quickly digital TV reaches the largest number of households.” *Id.*

Thus, cable comments notwithstanding, cable carriage of DTV signals is necessary for a timely end to the transition and a timely end to the transition is necessary for the preservation of the vibrancy of the entire system of free, over-the-air broadcasting, found by the *Turner II* Court to be the primary goal of Congress’ adoption of must carry.

#### **IV. A Digital Must Carry Requirement Would Be Upheld.**

In asking parties to supplement the record on constitutional issues, the Commission requested “that commenters that have previously submitted legal arguments on these points in response to the *Notice*, not repeat those arguments.” *Further Notice* ¶ 114. Ignoring this admonition, the cable opponents of a digital must carry requirement submitted extensive arguments that, for all practical purposes, repeat the arguments they previously made in this proceeding. To avoid further unnecessary burden on the Commission, NAB/MSTV/ALTV will not repeat our answers to those arguments and instead refer the Commission to the constitutional arguments we submitted in response to the *Notice*.<sup>80</sup>

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<sup>79</sup> CBO Report at Summary at 4.

<sup>80</sup> For the Commission’s convenience, the portion of NAB’s Reply Comments addressing the cable constitutional arguments is attached as **Appendix F**, which also deals with the

Almost all of the cable comments that addressed constitutional issues argued that digital must carry would not advance the interests that were identified by Congress as supporting mandatory carriage. In previous comments, we have shown that DTV carriage would indeed advance the same interests, perhaps to an even greater extent than analog carriage. DTV carriage, as we have also demonstrated, also will advance other strong governmental and public interests relating to the transition to digital television.<sup>81</sup>

To the limited extent that the arguments raised in the cable comments differ from earlier arguments, a few responses are in order. First, all of the constitutional arguments against a digital must carry rule rest on one assumption: that digital must carry would substantially foreclose cable operators' ability to provide other programming that they deem more desirable to cable consumers. That assumption is indeed central to any constitutional attack on a DTV carriage requirement for, as NAB/MSTV/ALTV have previously pointed out, if no cable programming were displaced by a must carry rule, no First Amendment question would be presented.<sup>82</sup>

As we have demonstrated, the rapid and widespread deployment of large-capacity digital cable systems requires a conclusion that – for the cable systems serving the vast majority of cable subscribers – a DTV carriage requirement would not displace any cable programming at all. This simple fact forecloses a constitutional argument about a digital

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Fifth Amendment arguments raised earlier by NCTA and repeated in its comments on the *Further Notice*. Time Warner is thus incorrect (Comments of TWC at 4 n.4) when it states that no one contested its takings analysis.

<sup>81</sup> See Comments of NAB (filed June 11, 2001) at 15; Reply Comments of NAB (filed Dec. 22, 1998) at 35-39; Comments of NAB (filed Oct. 13, 1998) at 35-42.

<sup>82</sup> See Comments of NAB/MSTV/ALTV (filed June 11, 2001) at 35-36.



must carry requirement. That there might be some cable system which – as a result of having to carry local stations’ digital signals – might not be able to carry some cable program for some period does not raise a question about the constitutionality of digital must carry generally.

The conclusion that requiring cable systems to carry digital signals in addition to analog signals does not alter the result the Supreme Court reached in *Turner II* is compelled by the fact that the Court was fully aware that a digital must carry requirement would be imposed on cable. The brief submitted in *Turner II* by cable programming interests, referring to the advanced television carriage provisions of § 614(b)(4)(b), advised the Court that “the Cable Act’s must-carry provisions authorize the FCC to grant must-carry status to additional spectrum,” as part of their unsuccessful argument that must carry would result in an unconstitutional burden.<sup>83</sup> The Court, however, did not regard this prospect as significant, recognizing that the one-third capacity cap fully protected the interests of cable operators and programmers. There is no basis on which the Commission could reexamine that conclusion.

The fact that the *Turner II* Court was cognizant of the prospect of a DTV carriage requirement also requires rejection of AT&T’s argument that a DTV carriage rule would be subjected to strict scrutiny. Comments of AT&T at 14-16. AT&T’s argument that the development of DBS as a competitor to cable would now justify a different level of First Amendment review misunderstands the nature of the constitutional inquiry. The Court

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<sup>83</sup> Brief for Appellants Turner Broadcasting System, *et al.*, at 18, *Turner Broadcasting System v. FCC*, 520 U.S. 180 (1997)(No. 95-992). Having argued to the Supreme Court that the 1992 Act mandated carriage of digital signals, cable should now be estopped arguing that “Congress never proposed any dual-carriage regime.” Comments of TWC at 5.

applied intermediate scrutiny in *Turner I*, not because of any assessment of cable systems' monopoly characteristics, but instead because it determined that the must carry rules are not content based.<sup>84</sup> In exactly the same way as analog must carry requirements, digital carriage requirements would apply to all local signals without regard to their content. Thus, there would be no basis for the application of strict scrutiny to a DTV carriage rule.<sup>85</sup>

Some cable commenters, while conceding that the growth in cable capacity has far outstripped any additional burdens that would be created by carriage of local digital signals, argue that part of that increased capacity is not employed for carriage of television signals, but instead for other services, such as telephony or internet access.<sup>86</sup> We have shown above that these services require only minimal bandwidth. *See* p. 10 *supra*. The remaining capacity of the average cable system is so large that carriage of

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<sup>84</sup> The *Turner II* Court also rejected arguments similar to AT&T's: "The dissent proceeds on the assumption that must-carry is designed solely to (and can only be justified as) a measure to protect broadcasters from cable's anticompetitive behavior . . . Federal policy, however, has long favored preserving a multiplicity of broadcast outlets regardless of whether the conduct that threatens it is motivated by anticompetitive animus or rises to the level of an antitrust violation. . . Congress has an independent interest in preserving a multiplicity of broadcasters to ensure that all households have access to information and entertainment on an equal footing with those who subscribe to cable." 520 U.S. at 194 (citations and quotes omitted).

<sup>85</sup> The arguments of programmers such as Courtroom Television Network (Comments at 9-11) that the Commission should reject a digital carriage requirement because of the claimed value of the public interest programming they provide similarly misapprehends the appropriate constitutional inquiry. As the Court recognized in *Turner I*, must carry does not rest on any evaluation of the value of particular broadcast programming, but instead on the importance of the system of local television broadcasting generally. Cable programmers without doubt provide excellent and worthwhile programs, but the Commission may not base regulatory decisions on any comparison between the worth of those programs and the programs on local television stations.

<sup>86</sup> *See, e.g.*, Comments of NCTA at 18-19; Comments of TWC at 21-24; Comments of HBO at 6.

both analog and digital local signals would still occupy far less capacity than that used for carrying analog signals in 1993 when the must carry rules went into effect, a fact which forecloses any argument that a digital carriage rule would burden cable to a greater extent than did the must carry rules upheld in *Turner II*.

To the extent that cable operators now argue that their choice to devote additional capacity to other businesses – rather than to different programming – is protected by the First Amendment, they go far beyond the constitutional interests the Court recognized in *Turner II*. Carriage of telephone or Internet traffic by its nature does not require, or indeed allow, the choice of specific content by a cable operator. Instead, the content of a telephone or e-mail message or the choice of which web sites to visit is determined by the customer. Cable is simply wrong in assuming that the relevant baseline for assessing the effects of a digital carriage requirement is the amount of capacity they choose to devote to the speech purpose of transmitting programming. If they choose to devote capacity to telephone or internet services, that is simply a business decision on their part. In that situation, if a capacity constraint results, it is a capacity constraint of the individual cable operator's own making. It is the cable operator's business choice – not the digital must carry requirement – which results in any displacement of programming. A cable operator in this position is thus no different, from a First Amendment perspective, from a cable operator with sufficient capacity to meet all must carry requirements while still carrying all cable programming the operator wishes – in other words, a cable operator with no First Amendment claim at all.<sup>87</sup>

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<sup>87</sup> Further, the arguments of cable *operators* that capacity is limited due to its being allocated to carriage of non-programming services detract from the constitutional arguments of cable *programmers*. If a cable operator chooses to allocate capacity to

Second, the cable arguments are self-contradictory. On the one hand, the cable comments contend that digital carriage will impose a particularly high burden on cable because few digital signals are carried under retransmission agreements, in contrast to analog carriage where a large number of signals were carried voluntarily before the must carry rules were adopted. *See, e.g.*, Comments of Starz Encore Group at 13-14. On the other hand, they suggest that a must carry rule is not needed because cable systems will voluntarily carry digital programming that cable customers demand. *See, e.g.*, Comments of AT&T at 8-9.

Of course, cable cannot have it both ways. Either cable systems generally will begin to carry local DTV signals voluntarily – in which case the burden imposed by a mandate to carry the rest would be small; or they will continue their current stance of refusing to carry digital signals – in which case the burden of a rule mandating their carriage would be, as the Court concluded in *Turner II*, “congruent to the benefit it affords.” 520 U.S. at 216. Surely, there can be no argument that, had cable systems’ refusal to carry local analog signals been even more widespread in 1992, the resulting burden on cable programming discretion would have required the Court to strike down must carry. In essence, the cable argument appears to be that, the more determined its pattern of disadvantaging competitors, the less the government can do to counteract it.

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telephony and other new ventures, it is that choice – as much or far more than any requirement to carry local digital signals – that may prevent the operator from carrying more cable networks. The cable programmers’ arguments thus fail because they cannot claim that, *but for* digital must carry, any network would have gained carriage. Indeed, support for this argument is provided by C-SPAN which concedes that C-SPAN3 is not distributed by AT&T not due to any regulatory problem, but instead because AT&T prefers other programming. Comments of C-SPAN at 4-5. The Constitution provides no protection for cable programmers from the marketplace choices of cable operators, and efforts by programmers to assert that must carry rules, and not marketplace decisions, are responsible for carriage decisions are unavailing.

AT&T Comments at 19-20 makes the extraordinary argument that the Commission should deny must carry status to broadcasters' DTV signals to create "a *greater* incentive to develop high-quality digital programming" (emphasis in original). The AT&T argument is merely a rehash of contentions cable interests raised against analog must carry requirements, where they also argued that stations' inability to attract an audience was due to programming and not the lack of cable carriage, and that if they had better programming, their signals would be carried. Congress and the Supreme Court properly rejected those arguments, understanding that without access to the majority of the audience, it is difficult to support attractive programming and that, "cable carriage would be of increasing importance to ensuring a station's viability." *Turner II*, 520 U.S. at 210.<sup>88</sup> The oft-repeated argument that stations would be carried if their programming were more popular also is belied by the finding of the House Report on the Cable Act that, generally, "the least popular local television signal is watched on cable systems by as many people who watch the most popular cable network."<sup>89</sup>

Similarly, Time Warner Comments at 9-10 contends that the growth of DBS as a competitor to cable makes it "implausible that cable operators could profitably act on any supposedly anticompetitive incentive." Identical arguments were raised in *Turner II* and rejected. The Court concluded that: "if viewers are faced with the choice of sacrificing a handful of broadcast stations to gain access to dozens of cable channels (plus network affiliates), it is likely they would still subscribe to cable even if they would prefer the dropped television stations to the cable programming that replaced them." 520 U.S. at

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<sup>88</sup> Moreover, just as the Commission could not rest a decision *for* DTV carriage on a content-based rationale, it cannot rest a decision *against* digital must carry on a desire to influence the content of broadcasters' digital signals.

<sup>89</sup> H. REP. NO. 628, 102d Cong., 2d Sess. 53 n.59 (1992).

202. Certainly, the advent of digital television, which allows broadcaster to offer more and different services that may compete with cable, creates an even stronger incentive for cable systems to disadvantage local DTV signals than existed in the analog world. Thus, the rationale for must carry rules is, contrary to cable arguments, greater now than it was in 1992.

Moreover, because there is no mandatory carriage requirement for DBS systems (only the market-by-market license requirement of carry one/carry all), it is far from clear that DBS could be relied on to constrain the ability of cable operators to deny carriage, particularly in smaller markets where local-to-local carriage is less prevalent. Of course, were DBS operators wholly free of carriage obligations as cable wishes to be, they would doubtless make the same calculation the Supreme Court posited for cable. In other words, they would carry enough local signals to entice subscribers, but would not carry the full range of local stations.

The constitutional arguments submitted by cable interests not only ignore the Commission's request that they not repeat material submitted earlier in this proceeding, they also largely rest on contentions that were presented by the same parties to Congress in opposing passage of the Cable Act, and to the Supreme Court in the *Turner* litigation. As NAB/MSTV/ALTV have demonstrated, the reasons for rejecting those contentions are even stronger now than they were before, and there are additional strong governmental interests in completing the transition to digital television, which favor a DTV carriage requirement. Further, the dramatic growth in cable capacity weakens – or indeed eliminates – any basis for a First Amendment concern at all. The Commission

should conclude, therefore, that a rule requiring cable systems to carry local digital television signals would easily pass constitutional muster.

## **V. DTV Requires a Broad Definition of “Program Related”**

The must carry provisions of the Cable Act require that, in addition to video, audio, and closed captioning, program-related material carried in the VBI or on subcarriers of local broadcast signals be carried by cable. Eight years ago, the Commission determined that, for purposes of analog must carry, what will be considered “program-related” will be guided by the three-part *WGN* test.<sup>90</sup> On reconsideration, the Commission declined to further define “program-related,” noting that carriage of information in the VBI was rapidly evolving.<sup>91</sup> It did, however, include as “program-related” “information intrinsically related to the particular program received by the viewer,” whether or not such information met the *WGN* test. Now, the Commission is asking how it should apply the statutory term “program-related” to the content to be carried on digital television signals.<sup>92</sup>

Broadcasters and other commenters argued that the transition to digital transmission requires the Commission to expand the narrow and analog-defined concept

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<sup>90</sup> *Report and Order* in MM Docket No. 92-259, 8 FCC Rcd 2965 (1993)(“*Must Carry Order*”); *WGN Continental Broadcasting v. United Video*, 693 F.2d 622, 626 (7<sup>th</sup> Cir. 1982).

<sup>91</sup> In re Implementation of the Cable Television Consumer Protection and Competition Act of 1992 Broadcast Signal Carriage Issues in MM Docket No. 92-259, *Memorandum Opinion and Order*, 9 FCC Rcd 6723, 6734 (1994)(“*Reconsideration Order*”).

<sup>92</sup> *Further Notice* at ¶ 122.

of what material is program-related and how that material relates to the primary video.<sup>93</sup> The Commission has already found that “the factors set forth in *WGN* do not necessarily form the exclusive basis for determining program-relatedness.”<sup>94</sup> Nor should they, particularly for DTV. Under the *WGN* test, a cable operator could take the position that a digital broadcaster could not time-shift programming on a second or third channel, produce zone-specific or community specific newscasting, or provide in-depth coverage of breaking news or emergency weather information on a second channel and have 68% of its audience receive these DTV broadcasts. Taking advantage in these ways of the new digital technology should not be precluded by rigid application of concepts inherently rooted in analog technology.

NAB/MSTV/ALTV thus urge the Commission to avoid the inflexible use of a copyright definition of program-relatedness in the digital environment. CEA and Walt Disney agreed with NAB/MSTV/ALTV that the Commission should abandon the *WGN* test for DTV. Comments of CEA at 10, Comments of Walt Disney at 5. While information that is wholly unrelated to a broadcaster’s program service should not be subject to must carry, the Commission should define “program-related” material that is entitled to carriage as all non-subscription material that adds to, supplements, or relates to the program service of the broadcasting station.<sup>95</sup> As the Walt Disney Company stated, “Congress included the ‘program-related’ carriage requirement in the Cable Act to

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<sup>93</sup> Comments of CEA at 9-10; Comments of Walt Disney at 3-6; Comments of Gemstar at 9-10.

<sup>94</sup> *Reconsideration Order* at 6734.

<sup>95</sup> Comments of NAB/MSTV/ALTV at 41; *see also* NAB Comments, MM Docket No. 98-120 (filed Oct. 13, 1998) at 39.



preclude cable operators from using their market power to undermine the viability of free over-the-air programming by refusing to pass through enhanced content which is part of the broadcast station's programming service." Comments of Walt Disney at 5.

Congress' intent in opening the cable gate should not be contravened and that gate slammed shut by a narrow definition of "program-related" at the beginning of the digital transition.<sup>96</sup>

Continued reliance on the factors enumerated in *WGN* simply will not yield a workable definition of program-related material for digital television. And to be workable, there must be a bright line test that does not leave basic carriage decisions up to the cable industry, or to an endless series of individual content-based decisions about particular programs. Comments of the cable industry here reveal the desire of cable operators to effectively eliminate carriage *of any and all* multicast programming streams as well as other enhancements to the digital broadcast programming service.

AT&T quite transparently reads what it wants into the program-related provision of Section 614(b)(3) by asserting that program-related should not include "advertiser-supported" material. Comments of AT&T at 28-29. It ignores the plain words and sentence construction of that provision. Plainly, the provision relegates to cable's

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<sup>96</sup> Further, by narrowly construing the term "primary video" to *exclude* from carriage all but one free, video programming stream, the Commission created a powerful disincentive for broadcasters to develop multiple streams of locally-oriented programming or innovative video services and ensured that cable subscribers and non-subscribers alike would be deprived of the full benefits that digital technology enables. We agree with the Public Broadcasters that the *Report and Order's* narrow reading of the term "primary video" coupled with the application of an analog definition of what is program-related undermines the future of free over-the-air broadcasting both during and after the transition. Comments of Public Broadcasters at 23-24.